Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

HONORABLE ALAN K. SILBERSTEIN, THOMAS SCHNEIDER, ESQUIRE, SIGMUND MORAWSKI, ESQUIRE, ADMINISTRATOR OF THE ESTATE OF KEVIN R. MURRAY, DECEASED, PHILADELPHIA MUNICIPAL COURT, CITY OF PHILADELPHIA, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS.

Honorable Alan K. Silberstein and
Thomas Schneider, Esquire,
Petitioners.

v.

KATHLEEN ZWAAN,
Respondent,

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law was clearly established at the time of termination of Zwaan's contract with the Philadelphia Municipl Court that independent contractors such as Zwaan enjoyed protection under the First Amendment for speaking out on matters of public concern such as an alleged sexual assault by the Court Administrator of the Philadelphia Municipal Court?

2. Whether respondent Kathleen Zwaan possesses a right of privacy under the Due Process Clause of the Fourteenth Amendment in nondisclosure of allegedly personal information obtained by petitioners during an investigation of the suicide of the chief administrator of the Philadelphia Municipal Court?

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PRAYER

The Honorable Alan K. Silberstein and Thomas Schneider respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit entered a judgment order in lieu of an opinion (App., infra, 1a-3a). The opinion and order of the United States District Court for the Eastern District of Pennsylvania (App., infra, 4a-11a) is unreported.

JURISDICTION

On May 28, 1998, the Third Circuit entered a judgment order (App., infra, 1a-3a) affirming the order of the United States District Court for the Eastern District of Pennsylvania denying qualified immunity to the petitioners. On June 29, 1998, the Third Circuit entered an order (App., infra, 12a-14a) denying the petitioners' petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law* * * abridging the freedom of speech."

The Fourteenth Amendment provides in section 1: "No state * * * shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Factual History

In early 1996, Judge Silberstein, President Judge of the Philadelphia Municipal Court, was confronted with a public tragedy involving allegations of financial impropriety, sexual misconduct and the suicide of a trusted court employee. This lawsuit is Zwaan's attack upon Judge Silberstein's management of the crisis and investigation of the circumstances which threatened the integrity of the Municipal Court. The jurisdiction of the district court was invoked under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and under 28 U.S.C. § 1331 (general federal question jurisdiction).

Zwaan owned the Municipal Assistance Program ("MAP"), a business which contracted with the Municipal

Court to provide after-hour clerical assistance for the Municipal Court's Protection from Abuse Unit ("Unit"). The Commonwealth of Pennsylvania funded MAPs' contract with an annual budget of almost $90,000. In the summer of 1995, Kevin Murray, Court Administrator of the Municipal Court, learned that Zwaan had bounced checks to MAP's employees and made questionable loans to family members who did not work for MAP. R. 246a-247a, 257a, 381a. Judge Silberstein directed Murray to investigate these financial problems so that Judge Silberstein could evaluate MAP's use of state funds and MAP's performance of its contract with the Municipal Court. R. 247a-253a. In the late fall of 1995, Judge Silberstein requested that Murray complete the investigation by the end of the calendar year. Murray sent several letters to Zwaan requesting MAP's financial records which Zwaan ignored. R. 153a-154a.

On December 22, 1995, Zwaan met with Murray in Murray's office. Several days later, Zwaan claimed to the Sex Crimes Unit of the Philadelphia Police that Murray assaulted her. R. 20a-44a, 171a-172a. On January 11, 1996, the Sex Crimes Unit obtained a search warrant and

searched Murray's office. Schneider, Judge Silberstein's Special Assistant, was present in Murray's office when the search was conducted and reported the search to Judge Silberstein. The police removed evidence from Murray's office which appeared to contain two small semen stains. R. 586a-606a. (All citations beginning with "R" refer to the Third Circuit Record). Schneider obtained the affidavit in support of the search warrant, which recited graphic details concerning Murray's alleged assault.

On January 25, 1996, after advising Judge Silberstein that Zwaan's allegations were not true, Murray committed suicide. Subsequent tests by the Philadelphia Police Laboratory and by Cellmark Laboratory ruled out Murray as the source of the semen stains seized in Murray's office. R. 861a-864a.

After Murray's suicide, Judge Silberstein became more personally involved in the investigation of MAP. Judge Silberstein directed Schneider to interview Municipal Court and MAP personnel concerning Murray, Zwaan, and the operation of the MAP program to gain an understanding of all of the issues involved in the events. Schneider interviewed more than a dozen individuals on these sub-

jects. R. 681a-725a.

Judge Silberstein also continued to seek the financial records of MAP initially requested by Murray in December, 1995. Zwaan, however, had retained counsel and refused to turn over the documents requested. On January 31, 1996, the Municipal Court terminated its contract with MAP because of Zwaan's refusal to cooperate with the financial investigation. R. 661a-668a.

Several days after Murray's suicide, Patrick O'Neill ("O'Neill"), the individual who originally recommended Zwaan to the Municipal Court, contacted Judge Silberstein and advised that he wanted to talk to Judge Silberstein about Zwaan. O'Neill also stated that another one of Zwaan's previous employers, Anthony Covatta ("Covatta"), wanted to provide some information to Judge Silberstein about a similar accusation that Zwaan made about him. R. 301a-303a, 315a-316a. On February 7, 1996, O'Neill and Covatta met with Judge Silberstein and Schneider in Judge Silberstein's chambers. The interviews covered a wide variety of subjects. Both former employers were asked about their businesses generally and about their employment of Zwaan. Both were questioned about any personal

relationship they had with Zwaan. O'Neill was questioned extensively regarding his recommendation of Zwaan to the Municipal Court. Covatta disclosed a sexual relationship with Zwaan and initiated the disclosure that Zwaan "performed oral sex with me, for me, to me." Some subsequent questions were follow-up questions to information disclosed by O'Neill and Covatta. Some of these questions related to Covatta's sexual relationship with Zwaan and were designed to test the truth of Zwaan's graphic allegations that formed the basis of the search warrant for Murray's office. R. 726a-860a.

Subsequently, Judge Silberstein showed the transcript of Covatta's interview to Geoff Gallas, Executive Court Administrator of Philadelphia's First Judicial District, and to Stuart Ditzen of The Philadelphia Inquirer in an effort to allow Mr. Ditzen to understand the nature of the personalities involved in the story. Significantly, Judge Silberstein showed the Covatta transcript to Ditzen on "deep background", i.e., on condition that Ditzen never use the transcript, directly or indirectly, in any article. Ditzen **never** published an article directly or indirectly concerning the Covatta transcript. Nor did any other reporter publish

an article about the Covatta transcript until more than one year after Zwaan commenced this lawsuit, when Zwaan's counsel advised the Third Circuit that Zwaan would not seek to have the record on appeal under seal as she had stipulated in the district court. R. 113a-116a, 324a-326a, 365a-366a.

Schneider never disclosed any interview transcripts to anyone and was even unaware of the disclosure of the Covatta transcript to Gallas and Ditzen.

B. Proceedings Below

In March, 1996, Zwaan filed this action alleging civil rights and Title VII violations against Judge Silberstein, Schneider, the Municipal Court, and other state and municipal entities. On June 24, 1996, Zwaan filed an amended complaint. Count VI in the Amended Complaint alleged that Judge Silberstein violated Zwaan's First Amendment rights by terminating her contract for reporting Murray's alleged sexual assault to the police. Count VII-A alleged that Judge Silberstein and Schneider invaded Zwaan's constitutional right of privacy by conducting an investigation regarding her allegations against Murray.

All defendants filed motions for summary judg-

ment. On July 2, 1997, the District Court dismissed Zwaan's Title VII claims against the state and municipal defendants on the ground that Zwaan was an independent contractor instead of an employee of the City of Philadelphia or the Philadelphia Municipal Court. App., infra, 4a, 11a. The District Court denied the motion of Judge Silberstein and Schneider to dismiss Zwaan's First Amendment and constitutional privacy claims on the basis of qualified immunity, ruling that the law regarding the First Amendment protections enjoyed by an independent contractor was not unclear at the time of Judge Silberstein's actions, depriving Judge Silberstein of immunity on Count VI's retaliation claim, and that "[p]laintiff is entitled to an opportunity to prove her version of [the] disputed factual issues regarding the invasion of privacy claim." App., infra, 4a-11a.

On May 28, 1998, the Third Circuit affirmed the District Court's July 2, 1997 order via judgment order. App., infra, 1a-3a. On June 29, 1998, the Third Circuit denied the petition of Judge Silberstein and Schneider for panel rehearing and/or rehearing en banc. App., infra, 12a-14a.

REASONS FOR GRANTING THE PETITION

This case raises two important issues which have produced conflicting decisions among the circuits: the meaning of "clearly established law" within the context of qualified immunity analysis and whether the Due Process Clause includes a right of privacy in the nondisclosure of personal information. The Court should grant certiorari to bring much-needed certainty and uniformity to these areas of law. Moreover, the decision below denying qualified immunity to Judge Silberstein and Schneider is erroneous.

I. The Court should grant certiorari to resolve the conflict concerning the definition of "clearly established law" within the context of qualified immunity analysis and to determine whether the law was clearly established at the time of termination of Zwaan's contract with the Philadelphia Municipal Court that independent contractors such as Zwaan enjoyed protection under the First Amendment for speaking out on matters of public concern such as an alleged sexual assault by the Court Administrator of the Philadelphia Municipal Court.

Count VI of Zwaan's Amended Complaint averred that Judge Silberstein violated Zwaan's First Amendment rights by terminating her contract in retaliation for making

accusations about Kevin Murray to the police. Judge Silberstein moved for summary judgment on the ground that on January 31, 1996, the date of termination of Zwaan's contract with the Municipal Court, there was no clearly established law that protected independent contractors such as plaintiff from termination of government contracts for their exercise of the freedom of speech. Judge Silberstein emphasized that the law on this subject did not become clearly established until the Supreme Court's landmark decisions on June 28, 1996 in Board of County Commissioners v. Umbehr, 518 U.S. —, 116 S.Ct. 2342 (1996) and O'Hare Truck Service v. City of Northlake, 518 U.S. —, 116 S.Ct. 2353 (1996). The District Court denied Judge Silberstein qualified immunity, and the Third Circuit affirmed.

The genesis for the District Court's and Third Circuit's determination lies in confusion over the proper definition of "clearly established law" within the context of qualified immunity analysis. The doctrine of qualified immunity protects government officials from liability "insofar as their conduct does not violate clearly estab-

lished statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The first prong of the qualified immunity test is whether the plaintiff has asserted a violation of a constitutional right at all, and whether the constitutional right asserted was clearly established at the time the defendants acted. Siegert v. Gilley, 500 U.S. 226, 232 (1991). This Court has never articulated the proper standard for evaluating whether the law is "clearly established". In fact, this Court has explicitly refrained from defining "the circumstances under which 'the state of the law' should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Courts." Harlow v. Fitzgerald, supra, 457 U.S. at 818, n. 32. In the absence of definitive guidance from this Court, the lower federal courts have had to struggle on their own with this difficult issue.

The Third Circuit has interpreted "clearly established law" to require "some but not precise factual correspondence between relevant precedents and the conduct at issue". Ryan v. Burlington County, 860 F.2d 1199, 1208

(3rd Cir. 1988), cert. denied, 490 U.S. 1020 (quoting People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144 (3rd Cir. 1984)). Although officials "need not predict the future course of constitutional law, they are required to relate established law to analogous factual settings." Id. at 1208-1209. Based upon this imprecise definition, Zwaan contended misleadingly that decisions from the Fifth, Eighth and Tenth Circuits "clearly established" the rights of independent contractors in the Third Circuit.

Other circuits, however, have adopted a much stricter definition of "clearly established law" than the Third Circuit. See Jenkins v. Talladega City Board of Education, 115 F.3d 821, 827, n. 4 (11th Cir. 1997) (en banc) ("the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"); Centanni v. Eight Unknown Officers, 15 F.3d 587 (6th Cir. 1994) (to find clearly established constitutional right, district court must find binding precedent by Supreme Court, its court of

appeals or itself); see also Ohio Civil Service Employees Association v. Seiter, 858 F.2d 1171, 1178 (6th Cir. 1988) ("mere handful of decisions of other circuits and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit").

Because qualified immunity issues arise in practically every action brought under 42 U.S.C. § 1983, this Court should grant certiorari to articulate a precise, uniform standard of "clearly established law". This Court appears poised to review this issue, having granted certiorari in County of Sacramento v. Lewis, — U.S. —, 1998 U.S. Lexis 3404 (1998), to determine, inter alia, whether the police officers' motorcycle chase of the plaintiffs' decedent violated "clearly established law", see Id. at —, 1998 U.S. Lexis 3404 at *42-43, but having decided that case on different grounds.

To "clearly establish" the definition of "clearly established law", this Court should adopt the narrow definition of "clearly established law" espoused by the Sixth and Eleventh Circuits. Jenkins, supra; Centanni, supra. This standard is more consistent with the purposes of qualified

immunity — the protection of "'all but the plainly incompetent or those who knowingly violate the law,'" Malley v. Briggs, 475 U.S. 335, 341 (1986), and the protection of state officials "from overenforcement of federal rights", Johnson v. Fankell, — U.S. —, 117 S.Ct. 1800 (1997) — than the "some but not precise factual correspondence" standard currently enforced in the Third Circuit. This standard is also easier to apply than the Third Circuit standard, which requires government officials faced with difficult, hurried decisions to assess whether their conduct comports with standards imposed by some or all of the twelve federal circuits. Bluntly put, the Third Circuit standard is capable of producing arbitrary results that fly in the face of the term "clearly established". For example, in Pro v. Donatucci, 81 F.3d 1283 (3rd Cir. 1996), the Third Circuit held that the defendant violated the plaintiff's "clearly established" First Amendment rights on the basis of Fifth Circuit precedent, even though acknowledging that its holding "may be somewhat inconsistent with opinions of the Court of Appeals for the Fourth and Seventh Circuits." Id. at 1291. The Third Circuit rationalized this strange

decision with the assertion that the law was "clearly established despite a circuit split, [because] 'no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule' to the contrary." Id. at 1292 (citing Bieregu v. Reno, 59 F.3d 1445, 1458-59 (3rd Cir. 1995)).

Government officials such as Judge Silberstein cannot be expected to function effectively when federal courts indulge in capricious second-guessing under the guise of the "some but not precise factual correspondence" standard. See id. The Sixth and Eleventh Circuit tests will bring certainty to the definition of "clearly established law" and foster more responsible decisionmaking by public officials.

Had the Third Circuit applied the Sixth and Eleventh Circuit standards in this case, Judge Silberstein would clearly have been entitled to qualified immunity on Zwaan's First Amendment claims. For the following reasons, the law governing the First Amendment rights of independent contractors was not clearly established in this Circuit on January 31, 1996:

1. As of January 31, 1996, the Third Circuit had never held that independent contractors possessed any First Amendment interest in government contracts. The only Third Circuit decision to address the First Amendment's application to independent contractors was Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) (en banc), which held that independent contractors had no right not to have their contracts terminated in retaliation for their exercise of First Amendment freedoms of political affiliation and participation.

2. The First Amendment rights of independent contractors did not become clearly established until five months after termination of Zwaan's contract, when this Court held in Umbehr, supra, that the First Amendment protects independent contractors from termination of government contracts in retaliation for their exercise of the freedom of speech.

This Court granted certiorari in Umbehr in June, 1995 "to resolve a conflict between the Court of Appeals regarding whether and to what extent independent contractors are protected by the First Amendment." Id., 135

L.Ed.2d at 850; see also Heiser v. Umbehr, 115 S.Ct. 2639 (6/29/95) (order granting certiorari). The fact that this Court found it necessary to decide Umbehr proves that the First Amendment rights of independent contractors were not clearly established prior to its decision. Had the law been clearly established, the Court would not have devoted its precious resources toward resolving this issue. See Swanson v. Powers, 937 F.2d 965, 970-971 (4th Cir. 1991) ("that the Supreme Court chose to write about the issue at all provides some degree of insight into the state of the law; presumably the Court would not squander its limited resources on an issue that was clearly settled").

3. The District Court's determination that Zwaan's First Amendment rights were clearly established on January 31, 1996 is flawed in several material respects. The court stated:

> My review of the reported decisions leads to the conclusion that the principal uncertainty which may be said to have existed was whether independent contractors, like employees, had a constitutional right not to be terminated or retaliated against for exercising their First Amendment right to political association; outside the political context there was no such uncertainty. For example, in Lefkowitz v. Turley, 414 U.S. 70 (1973), the high court ruled that

> independent contractors, just like employees, could not be required to waive their Fifth Amendment privilege as a condition of continuation of the relationship. In short, on this issue, I agree with the decision of Judge Rambo in Labalokie v. Capitol Area Intermediate Unit, 926 F. Supp. 503 (M.D.Pa. 1996).

App., infra, a.

It was plainly incorrect for the district court to conclude that the teachings in Lefkowitz concerning the **Fifth Amendment** rights of independent contractors clearly established independent contractors' rights under the **First Amendment**. Had Lefkowitz resolved the First Amendment conundrum, the Supreme Court would have denied certiorari in Umbehr, and the Tenth Circuit would not have written that the law governing independent contractors' First Amendment rights "is an area in which Supreme Court guidance is particularly needed." Umbehr v. McClure, 44 F.3d 876, 883 (10th Cir. 1995).

The district court's reliance upon Labalokie was also erroneous, because the Labalokie court based its decision upon the irrelevant reasoning in Lefkowitz. Labalokie, 926 F. Supp. at 506-507. Furthermore, Labalokie, a district court decision, cannot clearly establish

the law of the Third Circuit. Hawkins v. Steingut, 829 F.2d 317, 321 (2nd Cir. 1987) (district court decision will not "'clearly establish' the law even of its own circuit, much less that of other circuits").

For these reasons, this Court should grant certiorari in order to adopt a narrow, focused definition of "clearly established law" and should grant Judge Silberstein qualified immunity from Zwaan's First Amendment claim pursuant to this strict standard.

II. The Court should grant certiorari to determine whether respondent Zwaan possesses a right of privacy under the Due Process Clause of the Fourteenth Amendment in nondisclosure of personal information.

A. The Court of Appeals' recognition of a right of privacy in nondisclosure of personal information conflicts with the D.C. Circuit's reasoning that no such privacy right exists.

In Whalen v. Roe, 429 U.S. 589 (1977), this Court noted in dicta that the Fourteenth Amendment right of privacy may encompass the individual's interest in avoiding disclosure of personal information. A number of circuits, including the Third Circuit, have interpreted

Whalen to hold that a constitutional right of privacy exists in nondisclosure of personal information. See Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996); Scheetz v. Morning Call, Inc., 946 F.2d 202, 206 (3rd Cir. 1991) (acknowledging that the contours of this right are "murky"); Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986); Barry v. City of New York, 712 F.2d 1554 (2nd Cir. 1983). Conversely, the D.C. Circuit has expressed "grave doubts" as to the existence of this privacy right, reasoning persuasively that the Supreme Court's discussion of this issue in Whalen and Nixon v. Administrator of General Services, 433 U.S. 425 (1977), are mere dicta. American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, 118 F.3d 786, 791-793 (D.C. Cir. 1997). The Sixth Circuit has issued contradictory decisions on this issue. Compare Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (citing J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981)) (concluding that there is no general right to nondisclosure of private information) with Kallstrom v. City of Columbus, 136 F.3d 1055, 1063 (6th Cir. 1998) (city's disclosure of confidential information from person-

nel files of undercover police officers, including addresses of their family members, to attorneys representing alleged drug conspirators violated officers' privacy rights by creating "very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives"). Given the sharp division in the circuits' construction of Whalen, the time has come for this Court to grant certiorari and determine whether the Due Process Clause safeguards an individual's right of privacy in non-disclosure of personal information.

The importance of this privacy issue is obvious. Events unfolding in the White House have raised the question of whether "personal" information is exempt from governmental scrutiny to the forefront of our national consciousness. This case presents the perfect opportunity for this Court to determine if this alleged privacy right rises to the level of constitutional dimension.

B. The lower courts erred in determining that Zwaan has stated a cause of action for violation of her Fourteenth Amendment privacy rights.

The Fourteenth Amendment "right" of privacy in

nondisclosure of personal information (also known as the "confidentiality doctrine") is not a right at all but mere dicta within Whalen and Nixon that has taken on an illegitimate life of its own. Even if this right exists, Judge Silberstein and Schneider are entitled to qualified immunity due to Zwaan's failure to state a cause of action.

The confidentiality doctrine purportedly derives from Whalen, wherein this Court considered whether the state of New York could keep a centralized computer file listing individuals who had obtained dangerous prescription drugs. The Court stated:

> The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions....[T]he New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

Id. at 598-600. The Court stopped short of recognizing a right of privacy in nondisclosure of personal information with the disclaimer that the government's duty to avoid such disclosure only "**arguably** has its roots in the Constitution.... We ... need not, and do not, decide any question

which might be presented by the unwarranted disclosure of accumulated private data.... We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment." Id. at 605-606.

Whalen's discussion of the individual's interest in nondisclosure of personal information was therefore dicta. Nevertheless, without careful analysis, the Third Circuit and other circuits determined that this Court's reference to nondisclosure constituted binding precedent instead of dicta. The D.C. Circuit, however, grasped Whalen's true nature in American Federation of Government Employees, AFL-CIO, supra, stating:

> We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information. Were we the first to confront the issue we would conclude with little difficulty that such a right does not exist, but we do not, of course, write on a blank slate. The Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it.

Id., 118 F.3d at 791. The American court reviewed the above-quoted language in Whalen and "equally Delphic" language in Nixon and concluded that neither of these decisions provided a right of privacy in nondisclosure of

personal information. Id. The American court continued:

> If the Court's apparent hesitance to recognize such a right were not enough to give us pause, we also note that the cases cited in Whalen as evidence of 'the individual interest in avoiding disclosure' confirm our doubts that the Constitution protects a general right to privacy in the nondisclosure of information.

Id. None of the four cases cited by Whalen, wrote the American court, "argued for a general constitutional right to privacy in the nondisclosure of information." Id. at 791-792. Finally, the American court expressed considerable doubt that the Framers of the Constitution intended to create a right of privacy in nondisclosure of personal information:

> The Framers [could not] have intended that the federal courts become involved in an inquiry nearly as broad balancing almost every act of government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy.
>
> Inferring very broad 'constitutional' rights where the Constitution does not express them is an activity not appropriate to the judiciary. In this context, we note that of the cases cited holding that there is a constitutional right to nondisclosure of private information, none cites a constitutional provision in support of its holding. It is understandable, though rare, to fail to cite a supporting provision of the Constitution when one is dealing with

> such well-established rights as those in the first or fourth amendments. It is quite a telling failure when the constitutional right at issue is not well-established.

Id. at 792-793 (citing J.P. v. DeSanti, supra, 653 F.2d at 1090).

This Court should adopt American's persuasive logic and hold that the Fourteenth Amendment does not encompass a right of privacy in nondisclosure of personal information. Actions for invasion of privacy have long been recognized as legitimate under the common law. See, e.g., Harris by Harris v. Easton Publishing Company, 335 Pa. Super. 141, —, 483 A.2d 1377, 1384 (1984); Restatement (Second) of Torts §652D. No reason exists to transform a state law remedy such as an invasion of privacy action into a constitutional tort. As this Court recently emphasized in County of Sacramento v. Lewis, supra, "the Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the States." Id. at —, 1998 U.S. Lexis 3404 at *25 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)); see also Daniels v. Williams, 474 U.S. 327, 332 (1986) ("our Constitution deals with the large concerns of

the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"). A determination that that the Due Process Clause does not embody a confidentiality doctrine is consistent with this Court's historical "reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." Washington v. Glucksberg, — U.S. —, —, 1997 U.S. Lexis 4039, *29-30 (1997) (citing Collins v. Harker Heights, 503 U.S. 115, 123 (1992)).

The existence of a Fourteenth Amendment confidentiality doctrine will spawn endless litigation over the definition of "personal information", an inherently subjective concept that lies outside of the "large concerns of the governors and the governed". See, e.g., Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992) (where police officer suspended from duties pending investigation into his role in child sex abuse scandal, municipality had right to gather highly personal information regarding officer's sexual

profile as condition of employment reinstatement); Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (right to privacy not violated by questionnaire as to sexual and marital history); Davis v. Bucher, 853 F.2d 718, 720-721 (7th Cir. 1988) (inmate's privacy right not violated when state correctional officer exhibited nude photographs of inmate's wife to other inmates and made derogatory comments to sergeant regarding wife's anatomy; officers' acts "[did] not constitute the type of governmental abuse which demands a constitutional response"); Lapka v. Cloud County Sheriff, 1993 U.S.Dist.Lexis 10676 (D. Kansas 1993) (sheriff's acquisition and distribution of nude photographs of plaintiff did not violate plaintiff's privacy rights). Such trivial conflicts are best relegated to state common law proceedings. In the alternative, because the definition of "personal information" does not implicate the Constitution, Congress and the state legislatures are better equipped to formulate uniform definitions of "personal information" and other related concepts than federal courts. See, e.g., 5 U.S.C. § 552 (Freedom of Information Act); 18 U.S.C. § 2701 (Video Privacy Protection Act of 1988).

C. Assuming that a constitutional confidentiality doctrine exists, Judge Silberstein and Schneider are entitled to qualified immunity due to Zwaan's failure to state a cause of action.

Under the highly charged circumstances surrounding Kevin Murray's suicide, Judge Silberstein, as President Judge of the Municipal Court, had the power and the duty to investigate numerous lingering questions: the truth of Zwaan's startling accusations against Murray, Murray's conduct, Zwaan's procurement and administration of the MAP program, and the issue of how to improve the system in light of these terrible events. As the "executive and administrative head of the court," 42 Pa.C.S. § 325(e), Judge Silberstein was, indeed, obligated to conduct an inquiry. Judge Silberstein and Schneider, acting under Judge Silberstein's direction, undertook an inquiry into all of these questions by interviewing more than a dozen individuals, including MAP employees, Protection From Abuse masters, court employees and two of Zwaan's former employers. Only a few questions out of the entire investigation concerned intimate details of Zwaan's life, and the purpose of those questions was to test the truth of Zwaan's

graphic allegations to the police concerning Murray's alleged conduct. Judge Silberstein and Schneider never forced — or even asked — Zwaan to answer inquiries concerning any issues.

Although Judge Silberstein disclosed the transcript of Anthony Covatta's interview to one reporter, these disclosures did **not** cause public dissemination of any information obtained during the inquiry. The reporter complied with Judge Silberstein's request not to publish any article directly or indirectly related to the Covatta transcript. Zwaan has offered no proof of economic deprivation, discrimination or harassment from the isolated disclosure of the transcript. The transcript only became public over one year after commencement of this action, when Zwaan declined to keep the record on appeal under seal.

The undisputed facts also demonstrate that Schneider never disclosed any of the transcripts to anyone and was even unaware of Judge Silberstein's limited disclosure of the Covatta transcript. These facts, viewed objectively, prove that the investigation in this case does not give

rise to a cause of action for violation of Zwaan's constitutional rights. This Court should grant Judge Silberstein's and Schneider's certiorari petition to resolve the above-mentioned conflict in the circuits and to correct the Third Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1525 and NO. 97-1598

KATHLEEN ZWAAN

v.

HONORABLE ALAN K. SILBERSTEIN, THOMAS SCHNEIDER, ESQUIRE, SIGMUND MORAWSKI, ESQUIRE, ADMINISTRATOR OF THE ESTATE OF KEVIN R. MURRAY, DECEASED, PHILADELPHIA MUNICIPAL COURT, CITY OF PHILADELPHIA, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS.

Honorable Alan K. Silberstein and
Thomas Schneider, Esquire,
Appellants in No. 97-1525

KATHLEEN ZWAAN,
Appellant in No. 97-1598

v.

HONORABLE ALAN K. SILBERSTEIN, THOMAS SCHNEIDER, ESQUIRE, SIGMUND MORAWSKI, ESQUIRE, ADMINISTRATOR OF THE ESTATE OF KEVIN R. MURRAY, DECEASED, PHILADELPHIA MUNICIPAL COURT, CITY OF PHILADELPHIA, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS.

Honorable Alan K. Silberstein and
Thomas Schneider, Esquire,
Appellants in No. 97-1525

On appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 96-01662) District Judge: Honorable John P. Fullam

Argued May 21, 1998

BEFORE: SLOVITER, GREENBERG, AND GIBSON, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED and ORDERED that the orders of the district court from which the appeals have been taken, be and the same are hereby affirmed.

The parties will bear their own costs on these appeals.

BY THE COURT:

MORTON GREENBERG
CIRCUIT JUDGE

ATTEST:

P. DOUGLAS SISK, CLERK

DATED: May 28, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN ZWAAN	:	**CIVIL ACTION**
	:	
V.	:	
	:	
ALAN K. SILBERSTEIN, et al.	:	**NO. 96-1662**

MEMORANDUM AND ORDER

Fullam, Sr. J.

July 2, 1997

Plaintiff is suing the President Judge of the Philadelphia Municipal Court and various other court officials and entities, asserting that a court administrator sexually assaulted her, and that she was discharged from employment because she reported the incident to the police. The defendants have filed motions for summary judgment, and plaintiff has filed a motion for voluntary dismissal as to one defendant, which motion is opposed by the remaining defendants.

Because prompt disposition is necessary in view of the scheduled date for trial, and because the pertinent facts are well known to the parties and counsel, I shall dispense with a recitation of the facts.

I have concluded that the undisputed evidence conclusively establishes that plaintiff was an independent contractor, and not an employee of any of the defendants. For that reason, all of plaintiff's claims under Title VII will be dismissed.

Plaintiff seeks dismissal of her claims against the estate of the supervisor allegedly responsible for the sexual assault. The only reason given is that plaintiff does not wish to press any claims against the estate, and wishes to reserve only her right to assert counterclaims in the event the estate should later decide to sue her. The defendant estate consents to the withdrawal of plaintiff's claim in this action, without prejudice. While the remaining defendants object, I am unable to discern any possible prejudice they would sustain by the voluntary dismissal sought by plaintiff. Defendants may be correct in asserting that plaintiff will have difficulty proving damages in certain categories (for emotional distress, for example). But the fact that plaintiff herself may be prejudiced by the voluntary dismissal doe not adversely affect the remaining defendants. All relevant evidence will be admissible at trial. The

motion for voluntary dismissal will be granted.

The defendant Silberstein seeks summary dismissal on the basis of immunity. It is true that high government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights which a reasonable person would be aware of. See, e.g., Grant v. City of Pittsburgh 98 F.23 116, 121 (3d Cir. 1996).

There can be no doubt that, at the time of the events pertinent to this case, the constitutional right of an employee not to be discharged or retaliated against for the exercise of a First Amendment right was clearly established but, says the defendant, it was not until June 28, 1996, when the Supreme Court decided Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S.Ct. 2342 (1996) that independent contractors had a constitutional right not to be terminated or retaliated against for the exercise of First Amendment rights. The defendant points out that, in Umbehr itself, the Supreme Court referred to a conflict among various courts of appeals on this subject, and listed the Third Circuit as not extending First

Amendment protection to independent contractors. See Horn v. Kean, 796 F.2d 668 (3d Cir. 1986) (in banc).

My review of the reported decisions leads to the conclusion that the principal uncertainty which may be said to have existed was whether independent contractors, like employees, had a constitutional right not to be terminated or retaliated against for exercising their First Amendment right to political association; outside the political context there was no such uncertainty. For example, in Lefkowitz v. Turley, 414 U.S. 70 (1973) the high court ruled that independent contractors, just like employees, could not be required to waive their Fifth Amendment privilege as a condition of continuation of the relationship. In short, on this issue, I agree with the decision of Judge Rambo in Labalokie v. Capitol Area Intermediate Unit, 926 F.Supp. 503 (M.D. Pa., 1996).

Defendant makes the further argument that reporting sexual harassment was not recognized as protected speech at the time the incidents occurred. While I am inclined to doubt the validity of that assertion, I need not consider it in this case, because plaintiff did far more than

simply complain about sexual harassment: she exercised her fundamental First Amendment right to report a crime to the police. If, as plaintiff claims, the defendants summarily terminated her contract, and conducted an outrageous vendetta of reprisal against her, because she reported a sexual assault to the police, a reasonable person in the defendants' position would have realized that serious violations of plaintiff's constitutional rights were being committed.

Defendants Silberstein and Schneider also seek dismissal of plaintiff's claims for invasion of privacy, asserting that they did nothing more than conduct a reasonable and permissible investigation into allegations of financial mismanagement by plaintiff, and the circumstances surrounding the suicide of the court administrator, Mr. Murray. But if plaintiff's allegations are true, there is more to her case than that: the investigation included extensive inquiries of plaintiff's former associates and acquaintances, concerning plaintiff's morals and sexual practices; the release of transcripts of salacious interviews to the public press; and defamatory statements to the press

concerning plaintiff. Plaintiff is entitled to an opportunity to prove her version of these disputed factual issues.

Disputed issues of material fact also preclude granting summary judgment on the defamation claim asserted in Count VIII and the claim for intentional infliction of emotional distress in Count XI-A and XI-B.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN ZWAAN	:	**CIVIL ACTION**
	:	
V.	:	
	:	
ALAN K. SILBERSTEIN, et al.	:	**NO. 96-1662**

ORDER

AND NOW, this 2nd day of July, 1997, IT IS ORDERED:

1. Counts I through V of plaintiff's amended complaint are DISMISSED with prejudice.

2. Count IX (obstruction of justice) is DISMISSED with prejudice.

3. As to the defendant Sigmund G. Morawski, Administrator of the Estate of Kevin R. Murray, Deceased, plaintiff's amended complaint is DISMISSED, without prejudice, to the right of plaintiff to reassert these claims as counterclaims, in the event she is later sued by the defendant being dismissed.

4. In all other respects, all pending motions for summary judgment are DENIED. The case will proceed to

trial against the remaining defendants, Silberstein and Schneider.

John P. Fullam, Sr. J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1525 and NO. 97-1598

KATHLEEN ZWAAN

v.

HONORABLE ALAN K. SILBERSTEIN, THOMAS SCHNEIDER, ESQUIRE, SIGMUND MORAWSKI, ESQUIRE, ADMINISTRATOR OF THE ESTATE OF KEVIN R. MURRAY, DECEASED, PHILADELPHIA MUNICIPAL COURT, CITY OF PHILADELPHIA, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS.

Honorable Alan K. Silberstein and Thomas Schneider, Esquire,
Appellants in No. 97-1525

On appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 96-01662)

SUR PETITION FOR REHEARING

Before: Becker, Chief Judge, and Sloviter, Stapleton, Greenberg, Scirica, Cowen, Nygaard, Alito, Roth and Gibson, Circuit Judges

The petition for rehearing filed by the appellants, Honorable Alan K. Silberstein and Thomas Schneider, Esq., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

MORTON GREENBERG
CIRCUIT JUDGE

DATED: June 29, 1998

(2)

No. 98-636

FILED
NOV 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

HONORABLE ALAN K. SILBERSTEIN, et al.,

Petitioners,

v.

KATHLEEN ZWAAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

23 year old Kathleen Zwaan received a contract to provide clerical services to the Philadelphia Municipal Court ("PMC"). While so employed, PMC's chief administrator sexually assaulted her. After she went to the police, the administrator committed suicide.

Petitioner Silberstein, PMC's President Judge, terminated Ms. Zwaan's contract and denounced her in the media as a liar and carnal briber of the deceased administrator. Petitioner Silberstein and his assistant, Petitioner Schneider, launched an investigation of Ms. Zwaan's sex life, and Silberstein shared lurid details of her sex life with the media. In her complaint below, Ms. Zwaan has asserted that these actions were taken in retaliation for her having exercised her First Amendment right to seek redress of grievances by reporting the crime to the police.

The late Kevin Murray was PMC's chief administrator. In 1995, Murray wrote to Ms. Zwaan demanding that she produce all of her personal financial records, including copies of her checking account. Ms. Zwaan was unaware of any complaint regarding her performance under the contract.

At 6 p.m. on December 22, 1995, Ms. Zwaan was summoned to Murray's office where they met alone. Murray was drinking alcohol and offered a drink to Ms. Zwaan which she declined. He asked if she had received his letter advising her that her quarterly contract payment was being withheld because she had not produced her financial records. Murray also inquired about checks

she had written which had allegedly bounced,[1] her accounting practices and payments of personal expenses. Murray told her that she could go to prison for misappropriating funds because she was making loans to her family and paying personal expenses with the "state" money that had been paid to her.[2] Believing Murray to be an important public official, Ms. Zwaan feared imprisonment.

Murray repeatedly threatened to call the Philadelphia District Attorney and have her arrested on the spot. Between threats, he demanded that Ms. Zwaan give a reason for him to help her avoid jail. His threats and demands lasted almost one and one-half hours during which she was terrified and crying. Finally, Murray commanded her to take off her clothes. Thoroughly terrified and believing that she would be sent to prison if she did not comply, Ms. Zwaan removed her clothes. Murray stroked her body, put his penis in her mouth and ejaculated.

Ms. Zwaan went home and immediately reported the assault to family, friends and the local rape crisis center.

Though she believed Murray to be a powerful public official who could have her imprisoned, on December 26, 1995, Ms. Zwaan, accompanied by her father, reported the sexual assault to the Philadelphia police. As part of

---

[1] Only one check had been returned for insufficient funds, and Ms. Zwaan had immediately given cash to the payee upon learning that the check had not been honored.

[2] These threats were baseless. The "state" money had been paid to Ms. Zwaan pursuant to her contract with PMC. It was her money, and she was free to use it as she saw fit.

their investigation, the police instructed Ms. Zwaan to tell Murray that she needed more time to produce her records. This was to give the police time to obtain legal authorization under Pennsylvania law for a body wire.

On January 11, 1996, police equipped Ms. Zwaan with a recording device and sent her to confront Murray in his office. At that time, pursuant to police instructions, she gave Murray some, but not all, of the requested documents. After quickly reviewing the incomplete records, Murray agreed to release her quarterly contract check the following day. (Her quarterly payment had been withheld pursuant to Murray's instructions.) Ms. Zwaan then accused Murray of the sexual assault. Murray did not deny the charges or defend himself in any way. Instead, he responded by saying that he would get her check immediately.

After this meeting, the police confronted Murray and searched his office.[3] Murray declined to answer their questions and never offered any explanation to police concerning Ms. Zwaan's allegations.

On January 25, 1996, Murray killed himself. Acting at the direction of Petitioner Silberstein, PMC then forwarded several letters demanding the rest of Ms. Zwaan's financial records. One letter, faxed at 6:41 p.m., set 4:00 p.m. on the following day as the "deadline" for

---

[3] Though the police found semen stains on Murray's couch and rug, Ms. Zwaan had neither believed nor told police that his semen had contacted these items. Subsequent DNA tests eliminated Murray as the source of these stains.

production. When Ms. Zwaan sought a one day extension, Petitioner Schneider (at Silberstein's direction) wrote back terminating Ms. Zwaan. At that time, Silberstein was quoted in the Philadelphia *Inquirer* as declaring "That's it. She's finished."

Following Ms. Zwaan's termination, Silberstein again spoke with the news media. On February 3, 1996, the Philadelphia *Inquirer* quoted Silberstein as saying "She [Ms. Zwaan] can go peddle her wares somewhere else" and "I don't believe it. I think she made it up and if – the sex act – did happen, she initiated it because she didn't want her contract terminated. My view is whatever happened in that room she had a motive. She was willing to do whatever she had to do to keep her job."

Having terminated and publicly stigmatized Ms. Zwaan, only then did Silberstein initiate his purported investigation of her accusations against Murray. He directed his law clerk and Schneider to interview PMC staff concerning Ms. Zwaan's financial practices and her personal life. Petitioner Schneider, in fact, conducted these interviews.

On February 7, 1996, petitioners interrogated under oath two individuals about Ms. Zwaan's personal life and sexual practices. These interrogations of Anthony Covatta (a former boyfriend) and Patrick O'Neill (Ms. Zwaan's former employer) were conducted in Silberstein's judicial chambers before an official PMC court reporter and Silberstein's law clerk. Petitioners focused these interrogations on Ms. Zwaan's sexual practices, sexual preferences and moral character. They inquired into, *inter alia*, the identities of her sexual partners and whether (a) she

swallowed after performing oral sex, (b) she expressed pleasure about performing sex acts, (c) she would remove her clothes when doing so, (d) she had ever taken money for sex.

For example, petitioners questioned Covatta as follows:

"By Judge Silberstein:

> Q. And as result of this come-on did you ever turn into a relationship with Kathleen [Zwaan] between you and she?
>
> Q. And how many times would you say that she performed oral sex with you?
>
> Q. And of the ten times that she performed oral sex would you say that she initiated it all the time each time?
>
> Q. Did you ever have a conversation with her that she got any sort of pleasure doing this, that this was her preferred method of sex as opposed to straight intercourse so to speak?
>
> Q. As far as you know she was just performing oral sex because she liked to do it?
>
> Q. Do you know if she performed oral sex with anyone else that worked there?
>
> Q. Well, let's go to anyone else that didn't work there that you know?
>
> Q. And when you said her last boyfriend, was that the cop [Pennsylvania State Trooper Stumpf]?
>
> Q. And what's his [the boyfriend's] full name for the record?

Q. During that relationship she performed oral sex on Stumpf, as far as what he told you?

Q. And according to Stumpf what did she want to reel in when she performed this oral sex?

Q. And did he ever say to you while she was performing oral sex on him, or during that period of two year relationship, he had heard she was going with someone else or more or less a permanent relationship?

Q. Was there anyone else that you know that she had sexual relations with?

Q. Let's go back to the hot tub. Who was in the hot tub with her [Ms. Zwaan]? I assume they didn't have any clothes on in the hot tub, right?

Q. If I can just get back to the oral sex. When she was finished performing oral sex would she swallow?

Q. She wasn't a gagger?

Q. Spit it out or anything like that?

Q. So, during the period of time that she performed oral sex you weren't married?

"By Mr. Schneider:

Q. Did Kathy Zwaan ever brag to you about who else she had sex with or performed oral sex upon, or did she saying anything like that?

Q. Do you recall if she [Ms. Zwaan], or do you know if she ever performed oral sex in return for money?

> Q. Okay. Did she ever perform oral sex while she was naked? I mean did she ever take off her clothes first just –
>
> Q. But you also said that she was often in the mood just to do it just for the sake of doing it. Is that –
>
> Q. Did she have any other acts she liked to perform? Is this just one, was this her particular favorite, performing oral sex?

Subsequently, Silberstein permitted a reporter from the Philadelphia *Inquirer* to read the *Covatta* transcript which contained the previously cited references to Ms. Zwaan's sexual preferences, practices and partners. Silberstein also asked the District Attorney of Chester County, Pennsylvania (where Ms. Zwaan lives) for derogatory information about her.

Covatta told Trooper Stumpf (Ms. Zwaan's boyfriend) of his interrogation by petitioners and that Silberstein wanted to question Stumpf about Ms. Zwaan. Covatta also told Stumpf that either Silberstein or Schneider had said that Stumpf would "have no choice" but to cooperate with petitioners' investigation and answer their questions. Trooper Stumpf later told Ms. Zwaan about his discussion with Covatta, and informed her about Covatta's interrogation by petitioners.

Though he now professes to have merely been conducting a legitimate inquiry into the accusations against Murray, Silberstein has testified that he never at any time believed Ms. Zwaan. Moreover, Silberstein never consulted with Ms. Zwaan, her counsel, or the police about the truth or falsity of the allegations against Murray.

Ms. Zwaan sued Silberstein and Schneider for civil rights violations under 42 U.S.C. Sec. 1983 alleging, *inter alia,* retaliation and invasion of privacy.

The District Court denied Silberstein and Schneider's motions for summary judgment based on their asserted defense of qualified immunity. The Third Circuit Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

1. It is irrelevant to the resolution of this case whether or not the Circuit Courts may have differing standards for evaluating when a right is clearly established. Petitioners' actions were so extreme and the rights asserted by Ms. Zwaan so clearly established that reasonably competent public officials would have known that their conduct was proscribed by law. No further instruction by this Court is needed to make apparent the unlawfulness of petitioners' outrageous behavior.

This Court has held that public officials are not entitled to qualified immunity if the contours of the right allegedly violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted] but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). In *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982), this Court held that qualified immunity is defeated not because the officials "in fact

knew" that they were violating the Constitution, but because "reasonably competent public official[s]" who act with certain improper motives "should know the law [proscribes their] conduct."

After learning of the police investigation and Ms. Zwaan's role in it, Silberstein terminated Ms. Zwaan's employment contract, derided her in the press as a liar and carnal briber of Murray, and, with Schneider, convened a two-man grand jury in his judicial chambers to investigate Ms. Zwaan's sex life. Silberstein shared the salacious investigative results with the media. Nevertheless, petitioners improbably assert that, since they took these actions approximately five months before this Court decided *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), they had no way of knowing that Ms. Zwaan, as the holder of a contract with the government, had a clearly established constitutional right to report a crime to the police free from their outrageous vendetta. (Petition p. 10) Thus, they argue in effect that prior to *Umbehr* and *O'Hare*, reasonably competent public officials could have correctly understood that, by contracting with the government, Ms. Zwaan had somehow relinquished her First Amendment rights to report a crime to the police and to seek redress of grievances.

Petitioners argue that they could not have known that their vendetta violated the law because prior to *Umbehr* and *O'Hare*, the termination of a government contract in retaliation for exercising a First Amendment right had not previously been held unlawful. Not only does petitioners' argument contravene the rationale of *Harlow, infra*, it ignores the fact that they did far more

than merely terminate a contract. Nevertheless, they claim that they are victims of "capricious second-guessing" because the Third Circuit merely requires "some but not precise factual correspondence" between the right allegedly violated and the previous case law defining that right. (Petition p. 15) This argument, however, presupposes a putative legitimacy of action and uncertain definition of the rights implicated that simply do not exist here. Under the facts of this case, petitioners' malicious, protracted and carefully planned vendetta does not place them at the fringe of the permissible but, instead, constitutes the most extreme retaliation against Ms. Zwaan for exercising the well-recognized First Amendment rights of all citizens to report crime to the police and to seek redress of grievances. *United Minewc rkers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967) (the First Amendment right to petition for redress of grievances has long been recognized as "among the most precious of the liberties safeguarded by the Bill of Rights."); *California Motor Tranpsort Co. v. Trucking, Unlimited*, 404 U.S. 508, 510 (1972) (holding that the Petition Clause of the First Amendment encompasses the right of access to the courts); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

No reasonably competent public official could conclude that Ms. Zwaan had forfeited her right to report Murray to the police because she had contracted to provide clerical services to PMC. On the contrary, to a reasonably competent public official, there would be no mystery or confusion as to whether or not he could retaliate against a citizen – even one who holds a contract with the government – for reporting a crime and seeking

redress of grievances. These rights exercised by Ms. Zwaan were clearly established even without the holdings of *Umbehr* and *O'Hare* and regardless of any real or imagined split among the Circuit Courts.

2. By reporting Murray to the police, Ms. Zwaan exercised clearly established First Amendment rights to petition for redress of grievances and free speech. The Third Circuit properly affirmed the District Court's holding that, outside the political patronage context, independent contractors were entitled to the same degree of First Amendment protection as government employees. Since Ms. Zwaan was not a political appointee merely asserting the right to patronage spoils, petitioners had no reasonable basis for concluding that her involvement with the police was not constitutionally protected because of *Horn v. Kean*.

Petitioners contend that, based on the holding in *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986), they reasonably inferred that Ms. Zwaan, an independent contractor, did not enjoy First Amendment protections to report a crime to the police or to seek redress grievances. (Petition p. 16) However, *Horn* dealt with the right of political appointees to get and keep patronage contracts as motor vehicle agents for the State of New Jersey. Its holding is specifically limited to the political patronage context and deals with the right of political affiliation. It was the balancing of patronage concerns against First Amendment rights that caused the Third Circuit in *Horn* to depart from this Court's general prohibition in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) which expressly rejects any difference of constitutional magnitude between the threat of job loss to an

employee of the State, and a threat of loss of contracts to a contractor.

Unlike the motor vehicle agents in *Horn*, Ms. Zwaan was not a political affiliate merely asserting her right to keep a piece of the patronage pie. On the contrary, her retaliation claim is premised on her fundamental constitutional rights to report a crime to the police and to seek redress of grievances. Similarly, petitioners' retaliation went far beyond merely terminating her contract. Thus, citing *Lefkowitz, infra*, the District Court properly denied petitioners' summary judgment motion and held that, outside the political patronage context, independent contractors and government employees enjoyed the same First Amendment protections. (District Court Memorandum and Order, p. 3)

Petitioners' citation of *Horn* is but another illogical effort to create the illusion that reasonably competent public officials could think it proper to retaliate against an independent contractor for reporting a crime to the police. No rational interpretation of *Horn* supports such a conclusion.

3. Contrary to petitioners' claim, this Court has declared the existence of a constitutional right to privacy.

In a separate count of her complaint, Ms. Zwaan asserts that petitioners violated her constitutional right to privacy. Petitioners contend that the Circuit Courts have found the contours of the constitutional right to privacy to be unclear and that the District of Columbia Circuit Court even doubts the existence of such a right. (Petition

p. 20) On this basis, petitioners illogically conclude that this Court has never declared the existence of a constitutionally protected right to privacy. Petitioners' conclusion, however, flies in the face of ample authority. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") In *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), this Court said, "(T)he First Amendment has a penumbra where privacy is protected from governmental intrusion." See also *Stanley v. Georgia*, 394 U.S. 557 (1969); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting); id., at 78 (Powell, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). In *Paul v. Davis*, 424 U.S. 693, 713 (1976) this Court characterized these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."

Ms. Zwaan's sex life fits well within the parameters of the constitutional privacy right declared in the foregoing case law, and petitioners' unwarranted investigation of her sexual preferences, practices and partners violated her constitutional right to privacy.

4. Petitioners' claim that they did not violate Ms. Zwaan's privacy glosses over and grossly mis-characterizes abundant evidence to the contrary. The court below properly held that, given the record in discovery, Ms. Zwaan is entitled to prove at trial her version of the disputed factual issues underlying her claim for invasion of privacy.

Petitioners baldly assert that they did not invade Ms. Zwaan's privacy but, rather, conducted a legitimate inquiry into her "startling accusations against Murray" which merely touched on her sex life. (Petition p. 28) They make the patently silly argument that they are entitled to summary judgment because their investigation of Ms. Zwaan's sex life and the sharing of their pornographic findings with the media was a legitimate exercise of governmental power that did not invade her privacy. More importantly, they fail to address the basis on which the District Court denied their motion, i.e., that "disputed factual issues" existed as to the legitimacy of their actions, and, accordingly, Ms. Zwaan is "entitled to prove her version of these disputed factual issues" to a jury. (District Court's Memorandum and Opinion, p. 4) Thus, the District Court properly denied their motion for summary judgment. Fed. R.C.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In addition, the District Court's conclusion that the legitimacy of petitioners' actions was in dispute is amply supported by the record. In this regard, petitioners conducted anything but a legitimate inquiry into matters that were of proper concern to the administration of PMC. On the contrary, the record demonstrates that petitioners' investigation was a witch-hunt and gross invasion of Ms.

Zwaan's privacy that plumbed the depths of salaciousness in an effort to humiliate, degrade, embarrass and destroy her. In this regard, Silberstein has admitted that in the course of his "legitimate" investigation he:

> a. Never contacted police to learn what they had uncovered concerning Murray's actions;
>
> b. Never spoke or consulted with Ms. Zwaan or her counsel about her allegations;
>
> c. Never believed Ms. Zwaan's allegations about Murray;
>
> d. By the time he interrogated Covatta and O'Neill, he had already denounced her in the media as a liar who had tried to use sex to keep her job;
>
> e. Interrogated Covatta under oath about Ms. Zwaan's sexual practices and partners;
>
> f. Shared the *Covatta* transcript with the media;
>
> g. Interrogated O'Neill, a former employer of Ms. Zwaan, under oath about whether or not he had an affair with her or she had "come on" to him.
>
> h. Contacted the District Attorney of Chester County (where Ms. Zwaan lived) for derogatory information about Ms. Zwaan.
>
> i. Had Schneider question Ms. Zwaan's co-workers about her style of dress and sexual behavior.

In contrast, petitioners can cite no actions taken to investigate Murray, whom Silberstein had already decided was telling the truth.

The record overwhelmingly contradicts petitioners' claim that they did not invade Ms. Zwaan's privacy but simply investigated the truth of her accusations against Murray. In the face of this contradictory evidence, they are compelled to doggedly insist that they had a legitimate governmental purpose in investigating the identities of Ms. Zwaan's sexual partners, whether she expressed pleasure at performing sex acts, what kind of sex acts she liked, whether she performed sex for money, whether she performed sex acts with no clothes, whether she swallowed after performing oral sex and in sharing the answers to these questions with the media. In short, petitioners' actions and own words in their transcribed interrogations literally shout their improper motives in invading Ms. Zwaan's privacy to gain personal embarrassing information with which to humiliate, degrade, punish and intimidate her.

CONCLUSION

The record below establishes that petitioners were not engaged in conduct that they as public officials could conceivably have believed was reasonable. Put another way, how could petitioners under any circumstances reasonably believe that their actions were a justified and proper use of governmental power that did not implicate Ms. Zwaan's basic First Amendment rights? The evidence underlines again and again that, because she reported Murray to the police, petitioners set out to destroy Ms. Zwaan by terminating her contract, denouncing her in the media, and invading her privacy to humiliate, degrade, punish and intimidate her. And they used their

governmental offices and authority to accomplish their improper ends. Accordingly, the District Court properly denied petitioners' claim of qualified immunity, and the Third Circuit properly affirmed.

Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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Dated: November 13, 1998

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No. 98-636

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

HONORABLE ALAN K. SILBERSTEIN, THOMAS SCHNEIDER, ESQUIRE, SIGMUND MORAWSKI, ESQUIRE, ADMINISTRATOR OF THE ESTATE OF KEVIN R. MURRAY, DECEASED, PHILADELPHIA MUNICIPAL COURT, CITY OF PHILADELPHIA, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS.

Honorable Alan K. Silberstein and Thomas Schneider, Esquire,
Petitioners

v.

KATHLEEN ZWAAN,
Respondent

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY OF PETITIONERS, THE HONORABLE ALAN K. SILBERSTEIN AND THOMAS D. SCHNEIDER, TO RESPONDENT KATHLEEN ZWAAN'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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3 pp

Kathleen Zwaan's response to Judge Silberstein's petition to defer consideration of his certiorari petition misses the mark entirely. Count VI of respondent's complaint alleges that Judge Silberstein violated Zwaan's First Amendment rights by termination Zwaan's contract with the Philadelphia Municipal Court. Judge Silberstein contends that he is entitled to qualified immunity for the act of terminating Zwaan's contract with the Philadelphia Municipal Court, because the First Amendment rights of independent contractors did not become clearly established until five months after termination of Zwaan's contract, when this Court entered its landmark decisions in Board of County Commissioners v. Umbehr, 518 U.S. --, 116 S.Ct. 2342 (1996) and O'Hare Truck Service v. City of Northlake, 518 U.S. --, 116 S.Ct. 2353 (1996). Zwaan responds irrelevantly that Judge Silberstein stigmatized her in the media and invaded her privacy. These dubious claims have no bearing upon the first issue in Judge Silberstein's petition: was the law clearly established at the time of termination of Zwaan's government contract that Zwaan possessed a First Amendment right to retain her contract?

Zwaan's immaterial response does not obscure the importance of Judge Silberstein's certiorari petition, which gives this Court the opportunity to resolve the longstanding conflict in the circuits over the meaning of "clearly established law." Because this issue is at the heart of three cases currently awaiting decision in this Court, Conn v. Gabbert, No. 97-1802, Hanlon v. Berger, No. 97-1927, and Wilson v. Layne, No. 98-83, this Court should defer consideration of the certiorari petition in this case pending the decisions in Conn, Hanlon and Wilson. Alternatively, this Court should: (1) grant certiorari to decide this important issue; (2) adopt the narrow standard of "clearly established law" enforced in the Sixth and Eleventh Circuits under which the law is "clearly established" only by decisions of this Court, the circuit in which the case

arises, or the highest court of the state in which the case arises; and (3) hold that Judge Silberstein is entitled to qualified immunity for the termination of Zwaan's contract under this bright-line standard.

WHEREFORE, petitioners, the Honorable Alan K. Silberstein and Thomas D. Schneider, move this Court to defer consideration of the petition for writ of certiorari in the above-captioned case pending the Court's decision in Conn v. Gabbert, No. 97-1802, Hanlon v. Berger, No. 97-1927, and Wilson v. Layne, No. 98-83, or, in the alternative, to grant certiorari in the above-captioned case to review the "clearly established law" issue herein together with the "clearly established law" issue in Conn, Hanlon and Wilson.

Respectfully submitted:

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